Supreme Court, U.S.
FILED
011805 JUN - 6 2002
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

A.G.G. Enterprises, Inc.,
Petitioner
v.
Washington County and City of Beaverton,
Respondents

Pride Disposal Co.; Swatco Sanitary Service Inc.; United Disposal Service Inc.; Hillsboro Garbage Disposal Inc.; Washington County Drop Box Service Inc.; West Beaverton Sanitary Service Inc.; Aloha Garbage & Recycling Inc.; Don's Garbage Service Inc; Garbarino Disposal & Recycling Service Inc.; Oregon Refuse & Recycling Association; United States of America,
Intervenors

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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90 pg

In their normal course of business, commercial entities such as manufacturers, construction contractors and a myriad of various other businesses discard materials which can be recycled and reused.

QUESTIONS PRESENTED

1. Whether recyclable materials collected from commercial and industrial accounts, commingled with nonrecyclable materials and transported to recycling facilities, are property within the meaning of 49 U.S.C. § 14501(c)(1).

2. If the commodities described in Question 1 constitute property, whether the states are prohibited by 49 U.S.C. § 14501(c)(1) from regulating their transportation.

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Rule 29.1 Listing

A.G.G. Enterprises, Inc. has no parent companies nor non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.G.G. Enterprises, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a) is reported at 281 F.3d 1324 (2002). The opinion of the district court (App. 18a) is reported at 2000 WL 361892.

JURISDICTION

On March 12, 2002, the United States Court of Appeals for the Ninth Circuit entered its order and opinion in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statute[1] is as follows:

> 49 U.S.C. § 14501. **Federal authority over intrastate transportation**
>
> **(c) Motor carriers of property. –**
>
> **(1) General rule.**—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

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[1] Other statutes, not central to the questions presented and cited in this petition, are set forth in App. 51a-53a.

STATEMENT OF THE CASE

Facts

Recyclable materials. On a daily basis, manufacturers, construction contractors and commercial enterprises discard materials that can be recycled. These recyclable commodities include items such as wood, metal, cardboard, ceramics, tile, concrete, asphalt, roofing material, glass and drywall (Supplemental Excerpts of Record ["SER"] 2, 12-14, 23). These are "dry" recyclable commodities, not to be confused with "wet" garbage or putrescible garbage. This case concerns only "dry" recyclable materials (SER 22-23).

MRFs and MSW. Material recovery facilities ("MRFs") are establishments that specialize in the sorting of commingled, dry recyclable materials. Prior to transport to the MRF, the dry recyclable materials may be commingled with nonrecyclable material, which is referred to as mixed solid waste ("MSW"). MRFs sell the sorted recyclable materials on the open market. After sorting, the nonrecyclable material is transported from the MRF to a landfill.

Landfills. The other place to which an MSW load may be transported is a landfill, where the recyclable materials are not sorted, and are instead covered up and are lost forever.

Perpetual exclusive franchises. Since the late 1960s, Oregon local governments, such as Washington County and the City of Beaverton, have regulated their solid waste industry by carving up their geographic territories and awarding those divided territories to noncompetitive franchises. These franchises, who pay franchise fees to the local government, are for both residential customers as well as commercial accounts such as manufacturers, businesses and construction companies. No new franchise has been granted in Washington County since 1969, nor for more than 20 years in the City of Beaverton. (App. 24a).

Industry consolidation/vertical integration/burying of MSW loads. In 1996, there were 26 franchised haulers in Washington County, but by 2000, there were only 17, the result of acquisitions by Waste Management, Inc. and one other company.[2] Waste Management, Inc. also owns one of the two landfills in Washington County (SER 36-38), which creates additional incentives to bury recyclable commodities in the landfill rather than transport them to a MRF, since the transporter/landfill owner gets paid twice, once for the transport and once for the dump (SER 15-16). As a result of this vertical integration, MSW loads that once were sorted and recycled are now landfilled (SER 33-34).

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[2] Waste Management, Inc. itself is a behemoth, the result of a recent merger between the nation's largest and third-largest waste companies, Waste Management, Inc. and USA Waste, Inc.

Fruits of competitive enterprise. The City of Portland and Multnomah County are open to competition for the transportation of MSW to MRFs and do not use the franchise system except for residential service. The City of Portland has won national recognition for its recycling efforts. The City of Portland collects revenues from the transportation of solid waste through the use of a tonnage fee instead of through a franchise fee.

The franchisees in Washington County do not utilize the services of MRFs. Instead, the franchisees landfill these loads, even though they know there is recycling in every bit of the loads (SER 41, 43).

The business of AGG. A.G.G. Enterprises, Inc. ("AGG") is licensed by the Federal Highway Administration as a motor carrier of property (SER 4, 44). As part of its business, AGG enters into transportation contracts with various construction companies, manufacturers and businesses to provide drop boxes at the business's place of operation. The business places both recyclable materials and nonrecyclable materials into these drop boxes. Frequently, AGG's customers are bound by contract to recycle. Some commercial customers want AGG to transport MSW to MRFs because it brings them closer to meeting state and regionally mandated recycling goals (SER 9, 39).

AGG provides no residential garbage collection or curbside service (SER 2-3). AGG does provide "wet"

garbage collection, not material to this case, in Multnomah County and the City of Portland.

ECR, a MRF. AGG transports most of its MSW loads to East County Recycling ("ECR"), a MRF (SER 17, 22). AGG also utilizes several other recycling facilities (SER 130). ECR does not accept wet garbage, nor does it accept hazardous or toxic materials (SER 194, 22-23). ECR is in business to recover anything out of the dry waste system that it can take in and develop and move out for a fee (SER 17, 22). ECR can sort recyclable materials more efficiently than many businesses (SER 30-31).

High recovery rate. ECR's recovery rate, i.e. successful removal of recyclable materials from the MSW, is 50% to 60%, with approximately 60,000 tons processed per year (SER 25, 49-50). If concrete and asphalt were included, ECR's recovery rate would be 85% to 90% (SER 28-29).

Intrastate deregulation. In 1994, Congress passed legislation, now codified at 49 U.S.C. § 14501(c)(1), which prohibits states and their subdivisions from regulating the *intra*state transportation of "property" by motor carrier, thereby opening up the intrastate markets to competition. Previously, in 1980, Congress deregulated the transportation of property by motor carrier in *inter*state commerce.

***Woodfeathers* litigation.** In 1996 a roofing company filed suit against Washington County, alleging that 49 U.S.C. § 14501(c)(1) preempted Washington County's ordinance

regarding the transportation of MSW to MRFs. The district court agreed, held that MSW constituted property, and issued a preliminary and permanent injunction enjoining Washington County from enforcing its ordinance. *Woodfeathers, Inc. v. Washington County, Oregon,* 1997 WL 311480.[3]

The Ninth Circuit reversed on abstention grounds, due to a prior state proceeding involving Woodfeathers, stating that preemption was not readily apparent. *Woodfeathers, Inc. v. Washington County, OR*, 180 F.3 1017, 1022 (9th Cir. 1999).

Enforcement/citations. While *Woodfeathers* was pending, AGG was cited by both Washington County and City of Beaverton for transporting MSW without having an exclusive franchise (Excerpts of Record ["ER"] 131-133, SER 14, App. a). These citations were dismissed after the district court issued the preliminary injunction in *Woodfeathers, Inc. v. Washington County, supra.*

At the city's urging, AGG then applied for a license from the City of Beaverton. After a long delay and immediately following the Ninth Circuit's reversal in *Woodfeathers*, the City of Beaverton abruptly informed AGG that it would not take further action on AGG's application. (ER 134). AGG did not apply for a permit with Washington County, which has not issued a new franchise since 1969.

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[3] Judge Haggerty also found that the ordinances constituted an undue burden on interstate commerce and thus ran afoul of the Commerce Clause of the United States Constitution.

The district court found, just as did the district court in *Woodfeathers,* that such application would have been futile. (App. 24a, 28a).

Proceedings Below

AGG filed a complaint in the United States District Court for the District of Oregon, alleging that Washington County's and the City of Beaverton's solid waste ordinances were preempted by 49 U.S.C. § 14501(c)(1), and requesting the court to issue a permanent injunction against Washington County and the City of Beaverton as to the enforcement of the portion of the ordinances which conflicted with federal law. The district court allowed intervention in support of the defendants by Oregon Refuse and Recycling Association, a statewide association of franchised haulers, as well as several individual franchise haulers operating within the defendants' geographical limits.

The district court granted AGG's motion for a permanent injunction, holding that the transportation of the MSW, when collected from commercial and industrial accounts, are "property" within the meaning of 14501(1)(c), and that the local and state regulations of the transportation of those loads was thus preempted (App. 36a-37a). [4]

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[4] AGG also alleged that the ordinances were contrary to the Commerce Clause of the United States Constitution as they imposed barriers to the free flow of interstate commerce and that the ordinances, as enforced and applied to AGG, violate the equal protection provisions of the Fourteenth Amendment to the United States Constitution and the comparable provision in the Oregon Constitution. The district court

The Ninth Circuit reversed and held that Section 14501(c)(1) did not preempt the local regulation of the collection of the MSW, stating that Congress did not show a clear and manifest intent to do so.[5] (App. 16a).

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Important

Extensive national interest. As evidenced by the amici briefs filed in the Ninth Circuit[6], there has been tremendous national interest in this case, from the recycling industry, private industry, consumer interests, state and local governments, and national waste hauling companies. All interested groups are represented. The issues have been fully briefed, and the case is set for final resolution by this court.

National welfare affected. The issues in this case are of national significance and exceptional importance and directly affect the welfare of the nation.

Legal roadmap provided. The Ninth Circuit's opinion overlooks longstanding precedent of the Interstate Commerce

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ruled that the ordinances did not constitute an undue burden upon interstate commerce, and did not address the equal protection issue. AGG did not cross-appeal those holdings.

[5] In a separate proceeding filed while this case was appealed in the Ninth Circuit, AGG sought comparable relief from the district court regarding the consolidation of smaller loads for transport to the MRF. The district court denied that request. AGG did not appeal that decision. *A.G.G. Enterprises, Inc. v. Washington County, et al*, 145 F. Supp. 2d 1215, 1224 (D. Or. 2001).

[6] Amici curiae are listed at App 54a-56a.

Commission ("ICC"), the agency that has long been vested with responsibilities regarding recyclable materials[7], as well as congressional precedent. The ICC and Congress have provided a series of decisions and policies that provide this court with the necessary information to provide a reasoned decision. Of course, the states do not want this court to review that legacy, and have dug in to prevent this from occurring.

Impeded competition. In 1994 Congress passed legislation permitting competitive services for the transportation of recyclable materials. Eight years later, the states are still protecting turf that is no longer theirs. Congress and the ICC have a long history of extending favorable legislation and regulation to nurture the recycling industry, by easing the transportation-related regulatory requirements pertaining to recyclable material.

Judicial v. legislative relief. The states are attempting to accomplish through the courts what they were unable to accomplish through legislation, which is to overturn the offending portion of 49 U.S.C. § 14501 (c)(1). First they attempted legislative relief (p. 21, *infra*), which failed. Then they attempted judicial relief (*Kelley, p.18 infra)* which failed. The towing industry (p. 21, *infra*),

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[7] The ICC has recently been sunsetted, and its functions transferred to its successor, the Surface Transportation Board.

pursued legislation for the identical issue, and the states need to follow that lead.

***De facto* conflict.** There is tension between the holdings of *Kelley* and this case, which while not involving identical issues, nevertheless address similar preemption issues. Seven years after *Kelley*, the states still refuse to acknowledge federal preemption in this area.

No trampling of states' rights. The recyclable industry has changed. Construction debris should no longer be landfilled. "Garbage" and "refuse" are not the operative words, although those are the words used by others which distort the focus and which demonstrates a mentality that evolves from the era when everything was landfilled. Instead, the operative words are "recyclable materials" and "recycling facilities". The local governments are still free to regulate the transportation and disposal of the nonrecyclable materials that flow out of the MRF.

Trampling rights of business. By continuing to regulate the transportation of recyclable materials, the states are infringing on the inability of manufacturers, commercial establishments and businesses to make their own decision about their own soon-to-be discarded recyclable materials. That decision has been shifted by the local governments to the local franchisee, which in many cases is also the owner or operator of a landfill. As the owner or operator of a landfill, these franchises, which are frequently national waste

companies, thus get paid twice, once for the transport and once for the dump. And all of this occurs in the name of the states traditional powers over the collection of garbage.

Industry juggernaut. Washington County, a microcosm of what this case is about, has not granted a new franchise for more than 30 years, since 1969. In the meantime, national waste handling companies, such as Waste Management, Inc., have bought up franchises in Washington County, which has seen the number of franchised haulers, just in the tiny four year period from 1996 to 2000, dwindle from 26 to 17, as the industry has consolidated.[8] Waste Management, Inc. owns a landfill in Washington County, as well as being a franchised hauler, and is thus a "vertically integrated" company by virtue of its status of both a transporter and the owner of the landfill.

Unburying is not possible. This abhorrent practice of diverting good, valuable MSW loads to the landfill instead of transporting these MSW loads to the MRF has negatively impacted the recycling industry including MRFs such as ECR. For example, ECR previously received MSW loads from a location 60 feet from its premises. However, those loads are now landfilled (SER 33-34). Once those those recyclable materials are buried, they are forever gone. This nation no

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[8] Waste Management, Inc. intervened in the district court proceedings through one of its wholly owned companies, Don's Garbage Service, Inc., without disclosing to the district court its ownership of this company.

longer has the luxury, if it ever really did, of landfilling ever-diminishing natural resources, when those recyclable materials could instead be recycled and reused.

License to destroy. The act of a business of discarding its recyclable materials should not be turned into a license by others to effectively destroy those recyclable materials when federal law provides an alternative. The disposition by manufacturers, construction companies, commercial establishments and businesses of their recyclable materials is of tremendous importance to this country's welfare. Congress has a longstanding policy of protecting recyclable materials, and that policy needs to be adhered to at the state level.

Court sanctioned value evaporation. The district court found that the MSW loads have value and that the business of MRFs such as ECR "is based on the economic value inherent in the material". (App. 35a). However, the Ninth Circuit's decision allows that value to be lost even though it acknowledged that 80% to 90% of any load may be recyclable. (App. 15a-16a). The ICC and Congress have established laws and policies to prevent this backward form of thought process to govern today's world, and a pronouncement from this court is needed to implement those laws and policies.

District courts' disdain. Both district courts, in the *Woodfeathers* case and in this case, refused to condone the

defendants' practices and issued their respective permanent injunctions.

II. The Decision of the Court of Appeals is Erroneous

The Ninth Circuit relied upon a recent decision by a California Court of Appeals court (p. 19, *infra*) which was completely unencumbered by knowledge regarding even the undisputed portion of 49 U.S.C § 14501(c)(1). But first a look at the legal history of the transportation of recyclable materials.

ICC Precedent. We start with the ICC case of *Joray Trucking*, 99 M.C.C. 109 (1969). *Joray* involved construction debris that was taken to a landfill, a "wasteland", a word used several times in that opinion. The ICC concluded that this unwanted demolition debris had negative value, and thus did not have the attributes commonly associated with "property". 99 M.C.C. at 110. So in 1969 the country is landfilling construction debris that has no value, and that construction debris is not considered to be property.

Then, just two years later, the ICC stated its "concern with . . . the deterioration of our natural surroundings caused by . . . the misuse and depletion of our land and natural resources." *Transportation of "Waste" Products for Reuse and Recycling*, 114 M.C.C. 92 (1971). In this proceeding, the ICC said it "intend[ed] to give practical effect to this concern . . . and to take positive and concrete action to support and encourage antipollution programs" such as recycling. *Id.* at p.

93. The ICC concluded that these recyclable commodities were "property", stating that the recyclable materials "will become vital elements in the manufacturing process in which they are to be utilized. . . .". *Id.* at 104-05. Thus, recyclable materials qualify as property if they are of value in the manufacturing stream. Otherwise, the entire rulemaking exercise in *Waste Products* would have been a futility.

Congressional protection of recyclables. Congress itself has specifically addressed the importance of the transportation of recyclable materials. For example, former 49 U.S.C. § 10733 (App. 51a), enacted in 1980, provided an exception from normal tariff filings and permitted carriers to provide transportation of recyclable materials without charge or at a reduced rate. It is obvious that Congress deemed it important that the transportation of recyclable materials not be impeded in any way.[9]

The vestiges of this Congressional protection of the transportation of recyclable materials are still present in the federal statutes at 49 U.S.C. § 13709(h)(1)(C). (App. 52a). This statute, which addresses the procedure for resolving certain tariff-related claims (which, again, is largely mooted due to the passage of TIRRA), provides an exception from liability for these claims for (1) small business concerns under

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[9] The need for this statute became moot, and was thus repealed, when Congress eliminated the tariff filing requirements for interstate motor carriers through the passage of the Trucking Industry Regulatory Reform Act of 1994. Pub. L. No. 103-311, 108 Stat. 1686, § 206(d).

the Small Business Act, (2) charitable and similar organizations pursuant to [26 U.S.C.] Section 501(c)(3) of the Internal Revenue Code, and (3) recyclable materials. Recyclable materials are in nice, protected company.

Note also that Congress has traditionally allowed the transportation of mixed loads. *See* 49 U.S.C. § 13507 (App. 51a), permitting the transportation of regulated and unregulated property in the same vehicle.

Reasons for 49 U.S.C. § 14501(c)(1). The genesis of 49 U.S.C. § 14501(c)(1) was a food fight in which Federal Express and the United Parcel Service were engaged. Federal Express was organized as an air carrier, whereas UPS was organized as a motor carrier. The battle, over what state law or regulation applied to whom and how, ended up before the Ninth Circuit. *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), cert. den. 112 S. Ct. 2956 (1992).

Legislative history. Legislation was introduced via an aviation bill, contained in Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, 108 Stat. 1569, to eliminate the state economic regulation of all intrastate motor carrier transportation (excluding household goods). As seen in the conference report, Congress was aware of ICC precedent and was assured that the traditional collection of garbage would not be impacted by this legislation:

> The conferees further clarify that the motor carrier preemption provision does not preempt State regulations of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law, garbage and refuse are not considered "property." Thus garbage collectors are not considered "motor carriers of property" and are thus unaffected by this provision.

House Rep. No. 103-240, 103rd Cong. 2d Sess., reprinted in 1994 U.S.C.A.A.N. 1676, 1757 (1994).

Impact of legislation. The legislation passed both houses of Congress and became law. The change in the motor carrier industry was dramatic. Prior to the FAAAA, in most states only a chosen group of carriers, much like the franchises in this case, could transport a particular commodity within a particular region. For example, a motor carrier needed Oregon Public Utility Commission approval to transport a load of steel from Portland, Oregon to Eugene, Oregon, even though a carrier without OPUC authority could transport that same commodity from Portland, Oregon to Sacramento, California, waving its federal authority at the OPUC's office in Salem on its way down Interstate 5. Upon the passage of the FAAAA, all state-issued motor carrier certificates of authority, except for those pertaining to the movement of household goods, which were valuable and transferable prior to the passage of the FAAAA, became worthless overnight.

Kelley v. U.S. This legislation got the states and their friends all worked up and several of them marched off to federal court to have this preposterous legislation, as they viewed it, overturned. However, the 10th Circuit confirmed its legitimacy, notwithstanding its unintuitive origins. *Kelley v. U.S*, 69 F.3d 1503 (10th Cir. 1995). The states there claimed that the FAAAA:

> [p]reempts not only state economic regulation of intrastate trucking, but also "state tort laws, state antitrust loss, state consumer protection loss, state laws regarding cargo loss and damage claims, state laws governing the transportation of solid and hazardous waste, and state uniform commercial codes.

Id. at 1508. The *Kelley* court rejected these arguments, stating that the means chosen by Congress were reasonably adapted to the ends sought by Congress. It further downplayed these doomsday claims of the states, stating:

> Finally, although § 601 may have had some unintended effects, such as freeing the reigns on intrastate towing and wrecker services, plaintiffs have not cited any cases holding that unintended effects of legislation, by themselves, serve to make the legislation irrational for purposes of Commerce Clause analysis.

Id. at 1509. Thus, intended or even if unintended, 49 U.S.C. § 14501(c)(1) preempts the transportation of recyclable materials to recycling facilities.

Thus, everyone knew back in 1995 that Congress, through an aviation bill, deprived the states of their ability to economically regulate their intrastate transportation of property by motor carrier. The states and their friends refuse to acknowledge that reality.

District court decision. The district court concluded that the local and state regulation of these MSW loads, when transported to a MRF, were preempted by 49 U.S.C. § 14501(c)(1). (App. 36a-37a). In reaching this conclusion, the district court reviewed legislative history, as well as the historical treatment of this subject by the ICC. (App. 33a-36a).

California court confusion. Later, however, the court in *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.*, 110 Cal. Rptr. 2nd 708 (Cal. App. 1 Dist. 2001), which did not cite *Kelley*, stated that it was inconceivable that Congress intended to preempt state economic regulation of intrastate motor carriage. *Id.* at p. 175. Lest there be any doubt what the court was thinking, the court stated:

> The clear impression is that this is, as its name states, a congressional measure devoted to aviation.

Id. at p. 714. The California court did not even know, or at least certainly demonstrated no knowledge, that Congress had, seven years earlier and apart from the disputed recyclables issue, preempted the states' ability to

economically regulate its own intrastate motor carrier industry.

Even the federal government weighed in long after the briefing was done and shortly prior to oral argument. The government confirmed the constitutionality of 49 U.S.C.§ 14501(c)(1), albeit also offering its gratuitous and erroneous comments that 49 U.S.C § 14501(c)(1) did not apply to the transportation in issue.

Fortuituous adverse decision? Perhaps this decision from this state appellate court is fortuitous, as it crystallizes the misunderstanding of the fact that Congress deregulated intrastate surface transportation via an aviation appropriation bill. Legislation meanders through Congress on a line that is frequently more east-west than north-south. There are stranger stories about riders of various varieties being attached to various pieces of legislation. The procedure need not be intuitive, as long as the product is rational.

Ninth Circuit decision. The Ninth Circuit, which also did not cite *Kelley* (cited in AGG's appellate brief), refused to even consider or discuss the ICC cases (App. 14a), notwithstanding the well-known maxim that an agency's determination or treatment of a regulation is entitled to considerable weight. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, it found false solace in relying upon the uninformed holding in *Pleasant Hill*. (App. 16a).

Post-legislation activity: Towing industry. To be sure, the passage of the FAAAA caught some off guard. The people in the towing industry, itself also traditionally regulated by state and local authorities, suddenly found themselves without the ability to regulate in this area. They went back to Congress and got themselves an exception from the exemption, through the addition of subsection (2) (C) to 49 U.S.C. § 14501(c). (App. 53a). This subsequent legislation is the subject of a proceeding now before this court. *Our Garage and Wrecker Service et. al. v. City of Columbus, et. al., 257 F. 3d 506 (6th Cir. 2001), cert. granted, City of Columbus, et. al. v. Ours Garage & Wrecker Service, Inc., et. al., 122 S.Ct. 802 (2002).*

Failed technical corrections bills. There was further post-legislation concern as well about the impact of 49 U.S.C. § 14501(c)(1). One month after Congress passed the FAAAA, technical corrections bills were submitted in both the House of Representatives and Senate. 140 Cong. Rec. E1830-03, 1994 WL 498156-7; 140 Cong. Rec. S13283-02 (Sept. 12, 1994). Reference was made to an opinion of the ICC general counsel that the "movement of metal scrap from or to a foundry" would constitute the transportation of property within the preemptive sweep of Section 601(c). 140 Cong. Rec. E2204-03 (October 7, 1994). This is hardly surprising. There is a common sense distinction between recyclables

transported in a commercial context, as opposed to the curbside or residential collection of recyclable materials.

These technical corrections bill died. Since 49 U.S. C. § 14501 (c) (1) has not been "technically corrected" it still, at a minimum, technically preempts the transportation of recyclable materials to a recycling facility.

End result. The bottom line is that Congress knew what it was doing when it passed the FAAAA. Consistent with congressional policy and ICC precedent, Congress intended that the transportation of recyclable materials from construction sites, manufacturers and commercial establishments would be treated differently than curbside, residential collection which homeowners see on a weekly or periodic basis in their neighborhoods. Congress intended to allow the unshackled transportation of recyclable materials to recycling facilities, an activity that does not interfere with the states' police power over the transportation of garbage and refuse.

In order to get relief from the FAAAA, the states need to do what the towing industry did, dust off the technical corrections bills and get their exemption from preemption. The fix they need to seek is legislative, not judicial.

III. High Level of Interest

Extensive amici interest. As evidenced by the intervention at the district court level, and the numerous briefs filed with the Ninth Circuit (App. 54a-56a), there has been

tremendous interest in this proceeding, an interest level which exceeds the interest level in many of the cases accepted for review. There are no known other pending cases, at either the district court or circuit court level, which address this issue.

Improper objectives. The intervenor haulers confirmed that although there is recycling in every bit of garbage, they nevertheless take their mixed garbage loads to the landfill (SER 41, 43). A MRF, on the other hand, with its lower labor costs and higher expertise in sorting recyclable materials, can handle this job much more efficiently (SER 30-31). The states only want the ability to regulate, and the industry only wants the ability to improve its bottom line.

Naked support. If you strip away the states' turf protection, as well as the self-interest of the landfill industry, there is no support for the states' and intervenors' position. There are no public interest groups clamoring to be protected against the recycling of recycling materials by manufacturers and commercial and business concerns. On the other hand, there is strong support from entities like the American Forest and Paper Association, Association of California Recycling Industries, Californians against Waste, California Research Recovery Association, Grass Roots Recycling Network, Independent Recyclers Counsel, and the Northern California Recycling Association (App. 54a), all of whom desire that these recyclable materials be recycled instead of landfilled.

This court has recently granted review in a case involving public interests where there was a decision from only one circuit. *Whitman v. American Trucking Associations, Inc.*, 121 S. Ct. 903, 531 U.S. 457 (2201).

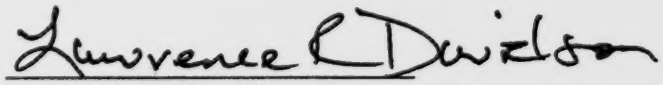
CONCLUSION

This petition is not about AGG, which is only a bug on the windshield of the solid waste industry. Instead, it is about implementing legislation passed by Congress eight years ago, which, together with the ICC, has a long history of protecting and nurturing the recycling industry. The states have resisted the need to come to grips with this legislation as well as with the evolution of the recycling industry.

This case has been briefed more fully, with extensive intervention and amici involvement, than many of the cases accepted for review by this court. This court is urged to accept this petition.

One person's trash is another person's treasure.

Respectfully submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGG ENTERPRISES, Oregon corporation,
Plaintiff-Appellee,

UNITED STATED OF AMERICA,
Intervenor,

v.

WASHINGTON COUNTY, CITY OF BEAVERTON,
Defendants,

PRIDE DISPOSAL CO.; SWATCO SANITARY SERVICE INC.; UNITED DISPOSAL SERVICE INC., HILLSBORO GARBAGE DISPOSAL INC.; WASHINGTON COUNTY DROP BOX SERVICE INC.; WEST BEAVERTON SANITARY SERVICE INC.,
Intervenors,

and

OREGON REFUSE & RECYCLING ASSOCIATION,
Defendant-intervenor-Appellant.

No. 00-35449
D.C. No.
CV-99-01097-GMK

AGG ENTERPRISES, Oregon corporation,

Plaintiff-Appellee,

v.

WASHINGTON COUNTY, CITY OF BEAVERTON,

Defendants,

PRIDE DISPOSAL CO.; SWATCO SANITARY SERVICE INC.; UNITED DISPOSAL SERVICE INC., HILLSBORO GARBAGE DISPOSAL INC.; WASHINGTON COUNTY DROP BOX SERVICE INC.; WEST BEAVERTON SANITARY SERVICE INC., ALOHA GARBAGE & RECYCLING INC., DON'S GARBABE SERVICE; GARBARINO DISPOSAL & RECYCLING SERVICE INC.

Intervenors-Appellants,

OREGON REFUSE & RECYCLING ASSOCIATION,

Defendant-intervenor.

No. 00-35509
D.C. No.
CV-99-01097-GMK

AGG ENTERPRISES, Oregon corporation,

Plaintiff-Appellee,

UNITED STATED OF AMERICA, intervenor,

Intervenor,

v.

WASHINGTON COUNTY,

Defendants-Appellant,

and

CITY OF BEAVERTON,

Defendant,

PRIDE DISPOSAL CO.; SWATCO SANITARY SERVICE INC.; UNITED DISPOSAL SERVICE INC., HILLSBORO GARBAGE DISPOSAL INC.; WASHINGTON COUNTY DROP BOX SERVICE INC.; WEST BEAVERTON SANITARY SERVICE INC., ALOHA GARBAGE & RECYCLING INC., DON'S GARBABE SERVICE; GARBARINO DISPOSAL & RECYCLING SERVICE INC.

Intervenors,

and

OREGON REFUSE & RECYCLING ASSOCIATION,

Defendant-intervenor

No. 00-35510
D.C. No.
CV-99-01097-GMK

AGG ENTERPRISES, Oregon corporation,

Plaintiff-Appellee,

v.

WASHINGTON COUNTY,

Defendant,

OREGON REFUSE & RECYCLING ASSOCIATION,

Defendant-Intervenor.

PRIDE DISPOSAL CO.; SWATCO SANITARY SERVICE INC.; UNITED DISPOSAL SERVICE INC., HILLSBORO GARBAGE DISPOSAL INC.; WASHINGTON COUNTY DROP BOX SERVICE INC.; WEST BEAVERTON SANITARY SERVICE INC., ALOHA GARBAGE & RECYCLING INC., DON'S GARBABE SERVICE; GARBARINO DISPOSAL & RECYCLING SERVICE INC.

Intervenors,

and

CITY OF BEAVERTON,

Defendant-Appellant.

No. 00-35511
D.C. No.
CV-99-01097-GMK

OPINION

Appeal from the United States District Court
For the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted
November 5, 2001—Portland, Oregon

Filed March 12, 2002

Before: Procter Hug, Jr., Thomas G. Nelson, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Gould

COUNSEL

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OPINION

GOULD, Circuit Judge:

OVERVIEW

Defendants-Appellants City of Beaverton and Washington County, Oregon appeal the district court's entry of a permanent injunction preventing them from enforcing their trash-hauling regulations against plaintiff-appellee AGG Enterprises ("AGG"). AGG collects and disposes of loads of construction materials -- mixed solid waste containing part recyclables and part non-recyclables – from its nonresidential customers. Defendants consider mixed solid waste the same as regular garbage or refuse, and they want AGG to be subject to their trash-hauling regulations.

AGG sued defendants for injunctive relief from those regulations in the district court, claiming that local trash-hauling regulations were preempted by a provision in the Federal Aviation Administration Authorizing Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c), that preempted state regulation of motor carriers transporting property. The district court granted a permanent injunction.

Defendants claim that the district court erred because Congress did not intend for mixed solid waste to be considered "property," and therefore the local regulations are not preempted. We agree, reverse the district court, and vacate the permanent injunction.

FACTUAL BACKGROUND

Plaintiff-appellee AGG Enterprises, Inc. ("AGG") is a waste removal service with operations in Oregon, Idaho, and Washington. AGG contracts with customers at commercial, industrial, and construction sites to collect materials such as brick, glass, tile, concrete, wood, cardboard, plastic, and metal. AGG's intra-Oregon services are at issue.

AGG handles two types of trash loads: recyclable presorted by customers ("source sorted"), and unsorted loads of non-recyclable, dry garbage mixed with recyclables ("mixed solid waste" or "MSW"). Only the MSW loads are at issue.

After AGG picks up the MSW loads from its customers, it delivers the loads to East County Recycling

("ECR"), a material recovery facility. ECR separates recyclables, recycles them, and hauls non-recyclables to a landfill. Neither AGG nor any AGG customer receives a rebate for the recyclable portion of a mixed solid waste load. According to AGG, customers with high labor costs find it cost-effective to have AGG pick up their mixed solid waste loads rather than to sort the recyclables themselves. AGG claims that the government-licensed trash haulers available to these customers will not take MSW to a recycling center such as ECR. AGG suggests that these customers rely on AGG to meet recycling commitments.

AGG does not know exactly how much of a customer's load is recyclable. AGG brings almost all its loads to ECR. ECR collects 60,000 tons of MSW per year, and claims that it recycles 50% to 60% of that. The owner of ECR stated that "he played with the numbers" one time to try to take into account the concrete and asphalt recycling from the MSW, and that brought the recycling rate up to 80% to 90%. Under the most extreme view, on average at least 10% to 20% of each load is garbage that is not recyclable.

Defendants-appellants Washington County and City of Beaverton ("Beaverton") regulate trash collection through the use of exclusive franchises. Both issue licenses or certificates granting exclusive authority to collect waste in one of 35 geographical areas. Under both systems, the exclusive franchisee provides residential and commercial

collection. Neither defendant regulates source sorted recyclables. Businesses and persons may haul waste they generate, without a license or certificate.

AGG does not hold an exclusive license. As a result, Beaverton cited AGG for unauthorized collection of solid waste, a violation with a maximum fine of $250. AGG then applied for a license from the City of Beaverton. After Beaverton informed AGG it would not take further action on AGG's licensing application, AGG brought suit for injunctive relief in the district court.[1]

The district court found that plaintiff was a "motor carrier" transporting "property" and that the Federal Aviation Administration Authorizing Act of 1994 ("FAAAA") preempted the defendants' exclusive licensing schemes. The district court granted plaintiff the permanent injunction, and defendants and intervenors appealed.[2]

DISCUSSION

I. Standard of Review

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[1] Several hauling companies with exclusive licenses from Beaverton and Washington County intervened on the side of the defendants.

[2] The United States of America intervened as a right on appeal to defend the FAAAA against a claim by defendants that the FAAAA, if preemptive of trash-hauling regulation, violates the Commerce Clause. We do not reach that issue in view of our conclusion below that the FAAAA did not preempt the power of local jurisdictions to regulate garbage collection.

We review de novo the district court's decision regarding preemption. *See Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, 1203 (9th Cir. 2002). We review de novo the district court's interpretation and construction of the FAAAA. *See Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1117 (9th Cir. 2001).

II. Language of the Statute

[1] Under the Supremacy Clause of the Constitution, federal law is the "supreme Law of the Land." U.S. Const. art. VI. Federal law overrides any conflicting state or local law. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983). Federal preemption "may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Branco v. UFCW-Northern California Employers Joint Pension Plan*, No. 00-15884, 2002 WL 200910, at *2 (9th Cir. Feb. 11, 2002) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). We must decide whether the FAAAA preempts local entities from regulating the collection of MSW loads.

[2] Preemption analysis begins with the "presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Also, "in cases . . . where federal law is said to bar state action in fields of

traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655 (internal citations omitted). Although Congress clearly intended the FAAAA to preempt some state regulations, we consider this "presumption against the preemption of state police power regulations" when we analyze the scope of the preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1966).

[3] Congress has recognized that waste hauling is a traditional state and local function subject to state regulation. *See* 42 U.S.C. § 6901(a)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies"). Our precedent has recognized the strong local governmental interest in regulating garbage collection. *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995). One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. *See generally California Reduction Co .v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 318 (1905); *Kleenwell*, 48 F.3d at 398. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a

strong caution against the possibility that Congress lightly would preempt local regulation in this field.

[4] Our inquiry under *Blue Cross*, and in light of this cautionary history, is whether it was the "clear and manifest" intention of Congress to preempt local regulation of the collection of loads containing part recyclable materials and part non-recyclables. 514 U.S. at 655.

We previously have held that the FAAAA's preemption of regulation of the collection of mixed solid waste is not "readily apparent." *See Woodfeathers, Inc. v. Washington County, Oregon*, 180 F.3d 1017, 1022 (9th Cir. 1999). *Woodfeathers* was a case about *Younger* abstention, and when we held that preemption was not "readily apparent," we were deciding only that FAAAA preemption of MSW regulation was an unsettled issue. *See id.* at 1021-22. We pick up now where we left off in *Woodfeathers* to decide the issue we there stated was undecided.

[5] To determine Congress' intent on preemption, we begin with the "text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *Blue Cross*, 514 U.S. at 655. Section 601(c) of the FAAAA provides:

> **(c) Motor carriers of property. –**
>
> **(1) General Rule.** – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a

> law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c). "Property" is the operative word for our analysis, but Congress did not define the term. Nor is the meaning of "property" perfectly clear from the context of the statute. So, to interpret this statute in accord with Congress' intent, it is appropriate that we look beyond the text of the statute to determine Congress' purpose in enacting this statute.

III. Legislative History

[6] Legislative history shows that the major purpose of the FAAAA preemption clause was to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to intrastate economic trucking regulation . . . ." H.R. Conf. Rep. No. 103-677, at 82 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754. Congress was concerned that package delivery companies organized as "motor carriers," such as UPS, were subject to state regulation, whereas companies organized as "air carriers," such as Federal Express, were free from state regulation. *See id.* Although this shows Congress had an intent different than preempting state regulation of solid waste collection, it does not settle the issue, because Congress may have had more than one purpose.

[7] Other legislative history gives insight into the intent of Congress on the scope of preemption and regulation of solid waste collection:

> The conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law, garbage and refuse are not considered 'property.' Thus garbage collectors are not considered 'motor carriers of property' and are thus unaffected by this provision.

H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. We said in dicta in *Woodfeathers* that the force of this piece of legislative history was debatable because the Interstate Commerce Commission ("ICC") case law, which Congress was told did not consider garbage and refuse "property," is equivocal as to whether it could be "property" or not. 180 F.3d at 1022. However, it is irrelevant in our present analysis whether or not ICC case law is equivocal. We are not concerned with what ICC case law says, but with what Congress intended in its statute and at most with what Congress *thought* ICC case law said. That is what shows us whether Congress had a "clear and manifest" intent to preempt state regulation of the collection of MSW loads. This legislative history is important, because it shows that if Congress exhibited any clear intent, it was an intent *not* to preempt state and local regulation of solid waste collectors.

Even if Congress was misinformed as to what ICC case law held, it believed that the statute it was passing would not affect local regulation of garbage and refuse collection.

AGG offers no other contrary legislative history to show an intent by Congress to preempt local waste collection laws.[3] Instead, AGG claims that the legislative history does not hurt its case. AGG argues that ICC case law considers MSW loads "property," and that therefore MSW is not "garbage and refuse," and is unaffected by the legislative history.

[8] We decline AGG's invitation delicately to parse the holdings of several ICC cases in combination. As stated above, we need not scrutinize ICC case law. About 40% to 50% of the MSW loads taken by AGG is non-recyclable garbage and must be taken to a landfill. Even under the highest proposed recycle rate, when the recycling center "played with the numbers," an average of 10% to 20% of the

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[3] AGG presents a few comments from members of Congress on a failed technical corrections bill. *See, e.g.*,140 Cong. Rec. E1830-02 (daily ed. Sept. 12, 1994) (statement of Rep. Cantwell). The comments declare that curbside recycling should be considered the same as garbage and refuse, in that the FAAAA should have no preemptive effect on such regulation. AGG tries to parlay these comments to show that while curbside recycling was meant to be the same as garbage and refuse, MSW should be considered "property." We do not subscribe to AGG's interpretation for whatever weight these post-enactment comments might be worth.

MSW load was non-recyclable. So it is undebatable that at least ten to twenty percent of everything AGG collects, thousands of tons, is "garbage and refuse." This is a lot of garbage, and we cannot accept the argument that Congress precluded local government entities from regulating its collection. Absent a "clear and manifest" purpose, if not an explicit instruction, from Congress, we decline to divest state and local governments of this area of regulation, crucial to health and safety. To the contrary, "Congress' intent *not* to preempt the area of solid waste collection is unambiguous.

Our decision is consistent with a persuasive decision of the California Court of Appeal that parallels this case. *See Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.*, 110 Cal. Rptr. 2d 708, 714 (Cal. Ct. App. 2001). That court ruled that the FAAAA does not preempt local regulation of the collection of MSW loads. We agree with the court that "[i]t verges on the inconceivable that Congress had such an intent. There is nothing in the language or legislative history of [§ 601(c) of the FAAAA] giving the least credence to [the MSW hauler's] claim that Congress intended to make itself the sole authority in a field where local authority has been traditionally accepted as preeminent." *Id.* at 717.

[9] We conclude that Congress did not show a "clear and manifest" intent to end state and local regulation of garbage and refuse collection merely because the load includes some recyclable material. That the load includes a

significant amount of garbage is sufficient to permit local regulation.[4]

CONCLUSION

[10] We hold that the FAAAA does not preempt local regulation of the collection of mixed solid waste. We reverse the district court's decision, vacate the permanent injunction, and remand for further proceedings consistent with this opinion.

REVERSED, VACATED, and **REMANDED.**

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[4] We express no opinion whether Congress intended to preempt regulation of source separated recyclables.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

A.G.G. ENTERPRISES, INC., an Oregon Corporation,	)	
Plaintiff,	)	Civil No. 99-1097-KI
v.	)	
	)	OPINION
WASHINGTON COUNTY, OREGON and CITY OF BEAVERTON, OREGON,	)	
Defendants	)	

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KING, Judge:

Plaintiff A.G.G. Enterprises, Inc ("AGG") brought this action against defendants Washington County, Oregon (the "County"), and the City of Beaverton, Oregon (the "City"), seeking to have chapter 8.04 of the Washington County Code on Solid Waste Control[1] and Chapter 4.08 of the City of Beaverton Code on Solid Waste Control declared unenforceable for three reasons: (1) preemption by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"); (2) violation of the Commerce Clause; and (3) violation of the Equal Protection Clause. I conclude that the ordinances as enforced against AGG are preempted by the FAAAA.

A similar case, Woodfeathers, Inc. v. Washington County, Oregon, CV96-257-HA, was heard by the Honorable

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[1] This ordinance was amended in December 1999, after AGG filed this action. AGG seeks only declaratory and injunctive relief. The parties agree that the court's analysis should be focused on the new version of the ordinance.

Ancer Haggerty. Judge Haggerty issued an injunction after holding that the County ordinance was preempted by the FAAAA and violated the dormant Commerce Clause. The Ninth Circuit reversed and ordered the case dismissed without prejudice, holding that the court should have abstained because of an action pending in state court. Woodfeathers, 180 F.3d 1017 (9th Cir. 1999). AGG operated in the County while the injunction was in place but ceased operations there after the Ninth Circuit decision. It filed this action a few months later.

A two-day court trial was held. Having considered the arguments of counsel, testimony of witnesses, and other evidence introduced by the parties, I make the following findings of fact and conclusions of law.

FACTS

AGG is in the business of hauling mixed solid waste ("MSW") and source-separated recyclable materials, typically contracting with businesses and construction companies to provide drop boxes at their sites. AGG does not provide services to residential customers, except in very limited cases which are not an issue in this action. It has the authority to transport property in interstate commerce under a Federal Highway Administration permit and an Oregon Department of Transportation motor carrier permit. AGG is headquartered in Multnomah County, which only regulates this type of business to the extent that a license is required of the hauler

but the number of haulers is not limited and they are not confined to particular geographic areas. AGG wishes to expand operations to unincorporated Washington County and the City of Beaverton[2], which enacted the ordinances at issue.

AGG brings its MSW loads to a material recovery facility ("MRF") and drops the load on the ground in a sorting area. MRF employees then sort, separate, and remove the recyclable material, primarily wood, plastic, metal, drywall, cardboard, glass, and concrete. The MRF then transports the remaining material, namely the "garbage," to local transfer stations for eventual transport to landfills.

East County Recycling, Inc. ("ECR"), the MRF used by AGG, recycles fifty to sixty percent of all loads delivered to its facilities by AGG and others. ECR sells recycled wood materials as hog fuel or mulching materials, recycled metals for use in steel and other metal manufacturing, and cardboard for use in manufacturing paper. Ceramics, concrete, asphalt, and glass are ground into a base rock product sold for use on highway construction projects. The MSW loads vary from ten to ninety percent recyclable material. It is possible for a MSW load to contain nothing recyclable but this is not a common occurrence.

AGG charges its customers, also known as generators,

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[2] Unless there is a reason to differentiate between the political entities or their geographic areas, I will refer to them collectively as Washington County.

a hauling fee and possibly a tipping fee. The tipping fee is the amount charged to AGG by the facility where AGG leaves the load and is passed on from AGG to its customer. Some Washington County landfills charge $40 per ton tipping fee; the Metro landfill charges $68 per ton; ECR charges $62.50 per ton. Some source-separated recyclable loads generate a rebate from the recycler where AGG takes them. AGG passes this rebate back to its customer. Metal, cardboard, and glass, depending on the market conditions, can generate a large enough rebate to more than cover the hauling fee, resulting in net money paid to the generator for selling recyclables. ECR keeps the money it makes from selling the recyclables it reclaims from the MSW loads.

Some of AGG's customers have contractual provisions to recycle a certain amount of their waste materials. Use of AGG, and its use of the MRF, is one way to comply. Although the customers could separate the recyclables at their own sites, it would require paying employees to do so and dedicating space for multiple drop boxes to contain the separated recyclables.

Some of AGG's customers in Multnomah County would also like to use its services in Washington County. These customers prefer to use a single hauler to reduce the interactions required to deal with numerous haulers in the separate geographic areas in which they do business. The customers testifying were also happy with AGG's prices and

service level.

AGG also hauls source-separated recyclable materials interstate between Oregon, Idaho, and Washington. Although this is a regular part of AGG's business, it is not the company's primary focus or primary source of revenue.

The ordinances make it unlawful for anyone to collect, store, transport or dispose of any waste[3] or solid waste in their areas of jurisdiction without receiving a certificate, license, or permit[4], or to conduct the activities in service areas not covered by the certificate. WCC 8.04.120; BC 4.08.030. To receive a County certificate under the new ordinance for an area the applicant is not serving, the applicant must show that the service area has not been allocated to another, or is not being served by the certificate holder, or is not being adequately served by the certificate holder and there is a substantial demand from customers within the area for a change of service. WCC 8.04.170. The City ordinance allows nonexclusive licenses for each service area, BC 4.08.040, but the City has never awarded more than one license for a geographic area. The franchisees are required to

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[3] Waste is defined as "material that is no longer useable or wanted by the source of the material, which material is to be utilized or disposed by another." "Utilized" includes recycling. WCC 8.04.020(Q).

[4] The Washington County Code and Beaverton Code use slightly different terminology although the idea is the same. I will use the words "certificate" or "franchise" unless it is necessary to distinguish.

service both residential and commercial customers in their geographic areas. Civil penalties can be assessed for violations.

The State of Oregon has a goal of recovering at least fifty percent from the general solid waste stream by January 1, 2000. ORS 459A.010(1). The franchise process and the ordinances are the City and County's way of supporting that goal by providing service at a reasonable cost to all residential and commercial customers.

Neither the County nor the City has awarded a new franchise since the ordinances were put in place, in 1969 in the case of the County and over twenty years in the case of the City. The ordinances contain no mechanism to periodically award franchises anew after an open bidding process. A few franchises have been transferred when a hauler was purchased.

AGG does not hold any of the certificates required by the ordinances. When it tried to expand its business from Multnomah to Washington County, AGG received citations from both the County and the City. After the Woodfeathers decision was reversed, the City informed AGG that it would not take further action on AGG's application for a license. AGG has not applied for a certificate from the County.

Gail Woodworth has been openly engaged in transporting construction debris in Washington County for over twenty years. His company hauls both source-separated

recyclables and MSW loads. Woodworth has neither of defendants' solid waste certificates but has never been challenged by the County or City about his right to transport these loads. Woodworth was the president of the Oregon Dump Truck Association in 1987-1988 and knows of none of its several hundred members operating without certificates who have been challenged by a government entity. Because of staff limitations, the County's enforcement mechanism is driven by complaints. Very few complaints about unauthorized drop boxes have ever been received by the County. In particular, the County has never received a complaint about a dump truck operator hauling MSW loads without authorization.

Individual haulers are concerned that their established relationships with customers, and their profitability, will be jeopardized if AGG, and presumably others, do business in the County and the City by "cream-skimming" the most profitable jobs, those for commercial customers. The haulers are required by their certificates to also service the less profitable residential customers within their exclusive territories. All rates are regulated so that services the County and the City deem essential, such as less profitable residential recycling, are provided to all customers while haulers maintain a reasonable profit margin.

DISCUSSION[5]

I. Justiciability of the Case

A. Standing

Defendants claim that the court should not hear this case for several reasons: (1) AGG lacks standing; (2) AGG's claims are not ripe for review; and (3) the court should abstain.

To meet the standing requirements of Article III, "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. The injury must be distinct and palpable [,] not merely speculative, and the harm must be imminent and not hypothetical." Houston v. Roe, 177 F.3d 901, 907 (9th Cir. 1999) (citation omitted), cert. denied, 120 S. Ct. 1168 (2000).

AGG has standing to raise its claims. It has been cited under both ordinances at issue and is asking this court to prohibit enforcement of the ordinances so that it may continue expanding its business into Washington County. Thus, its injury would be redressed by the requested relief. Although AGG is not currently operating in the County or the City, and consequently could not be cited for its activities today, the harm is not hypothetical or speculative. Based on their past

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[5] Defendants and the various intervenors split the briefing task and join the arguments presented by the others. I will refer to all as defendants unless it is necessary to distinguish.

conduct, the City and the County intend to enforce the ordinances. There is no requirement that AGG continue to incur civil penalties while this case is adjudicated.

B. Ripeness

Defendants also contend that this case is not ripe for review because AGG has not applied for a certificate from the County, failed to complete the application process with the City, and failed to exhaust its administrative remedies. Defendants also contend that withholding review will not result in any direct and immediate hardship to AGG.

Ripeness is determined by a two-prong test: (1) the fitness of the issue for judicial decision; and (2) the hardship to the parties of withholding court consideration. Municipality of Anchorage v. United States, 980 F.2d 1320, 1323 (9th Cir. 1992). Review is postponed if the "systemic interest in postponing adjudication due to lack of fitness outweighs the hardship on the parties created by postponement." Id.

I first note that if AGG is correct that the ordinances are unconstitutional or are preempted by federal law, it should not be required to apply for a certificate to challenge the ordinances in this court. This is a different situation than if the ordinances were valid but the governments were illegally withholding certificates. For the same reason, a more developed evidentiary record is not relevant to the questions that this court will answer. The hardship on AGG of

withholding review is that its business activities, and subsequent profits, are restricted. I disagree with defendants' contention that postponing review will have no effect on AGG's day-to-day affairs. Applying defendants' argument, I do not see how this action would ever be considered ripe because AGG would never suffer a hardship.

I also conclude, based on the application process with the City, and both governments' failures to ever award new certificates except through ownership transfer, that it would have been futile for AGG to pursue applications with either the City or the County. Moreover, even if AGG had been awarded a geographic area in which to do business, it would still have been prohibited from working in all parts of the City and unincorporated Washington County, as it wishes to do. Because there is a sufficient factual record for the issues before the court, I conclude that the case is ripe for judicial review.

C. Abstention

Finally, defendants contend that the court should abstain under the *Burford* abstention doctrine from adjudicating AGG's claims because my ruling could impair the operation of the City and County's comprehensive regulatory schemes.

The Supreme Court began explaining the *Burford* abstention doctrine in Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943), when discussing its reluctance to decide questions

turning on largely local issues.

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of a question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (internal quotation omitted). The Ninth Circuit has added additional requirements before *Burford* abstention is justified:

> 1) the state must have concentrated suits involving the local issue in a particular court; 2) the federal issues must not be easily separable from complicated state law issues with which the state courts may have special competence; and 3) federal review might disrupt state efforts to establish a coherent policy.

Fireman's Fund Insurance Co. v. Quackenbush, 87 F.3d 290, 296 (9th Cir. 1996).

I fully agree that the waste control systems in the County and the City are issues of great local concern. AGG claims, however, that the government entities are overstepping their authority and violating federal law and the

federal Constitution. The issues before me do not turn on state law. This is true even though, if AGG prevails, many state and local government laws pertaining to solid waste may have to change. "The state's attempts to establish a coherent policy are of little consequence, as it is the constitutionality of the state's efforts to do precisely this which is currently in question." Id. at 297. Although AGG could have its claims heard in state court, federal court is also appropriate. I decline to abstain.

II. Preemption

Under Article VI of the Constitution, the laws of the United States are the supreme law of the land and any conflicting states law is without effect. Southern Pacific v. Oregon PUC, 9 F.3d 807, 810 (9th Cir. 1993). Congress may preempt state laws by explicitly defining the extent to which preemption occurs. Id. When determining if a state statute is preempted by federal law, the "sole task is to ascertain the intent of Congress." California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987).

Congress acted to deregulate the motor carrier industry when it enacted the Federal Aviation Administration Act of 1994 ("FAAAA"). The Act contains a preemption provision:

> (1) General rule. . . . [A] State, political subdivision of a State, or political authority of 2 or more States may not

> enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c). The difficulty lies in the fact that the term "property" is not defined in the Interstate Commerce Act.

A. Motor Carrier.

Defendants contend that AGG is neither a motor carrier nor a motor private carrier and, thus, the FAAAA cannot apply to it. Defendants contend that under the "primary business test" distinguishing between the two, AGG would be a motor private carrier. Since the trips at issue are not interstate commerce, however, defendants contend that AGG does not fulfill this prong of the motor private carrier definition.

The Interstate Commerce Commission ("ICC") does not have jurisdiction over the transportation of property by motor vehicle when the property is transported by a person engaged in a business other than transportation and the transportation is within the scope of and furthers a primary business of the person other than transportation. Nuclear Diagnostic Laboratories, Inc., 131 M.C.C. 578, 581 (1979); American Trucking Assoc. v. I.C.C., 672 F.2d 850, 851 (11th Cir. 1982). Several factors are considered.

I conclude that under the primary business test, AGG

is a motor carrier and not a motor private carrier. The terms written on the back of AGG's standard contract state that AGG acquires title to waste materials once they are loaded onto its trucks. Another term, however, differentiates waste materials from recyclables. It is undisputed that AGG passes tipping fees through to the customer and returns to customers rebates which are obtained from the source-separated loads. Although there are no rebates from the MSW loads, I am unwilling to compartmentalize AGG's business to that extent. AGG does not perform any service other than transportation. It does not store the loads, does not consolidate partial loads from different customers before transporting to the MRF or another recycler, and does not perform any type of service on the load except to transport it to a proper disposal facility. This is different from the trucker in Nuclear Diagnostic which sold containers and other materials to its customers, conducted monitoring tests on the loads of radioactive waste, sealed containers, stored loaded containers, and consolidated containers before transporting to the final disposal sites. Id. at 583. AGG's primary business is to transport the loads from the customer site to a disposal facility, nothing more.

Motor carrier is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(12). AGG fits this description. Accordingly, the FAAAA can apply to it.

B. Property

As mentioned above, the FAAAA preempts laws relating to the transportation of property but does not define property. Defendants contend that the MSW loads are not property, and thus can be regulated locally, because these loads have a negative value to the generator, AGG's customers, who must pay to have them hauled away.

The ICC analyzed the meaning of property in conjunction with the Interstate Commerce Act in Joray Trucking Corp., 99 M.C.C. 109 (1995). A trucker sought a certificate to haul rock and debris generated from excavations and building demolitions. The ICC concluded that the debris, which would be disposed of as fill for wasteland, had a negative value as a commodity because it was not purchased from the contractors seeking its removal. Id. at 110.

A court may look to the legislative history for evidence of congressional intent if the statute is ambiguous. United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999). Although the lack of statutory definition does not require a finding of ambiguity, id., the parties have offered several definitions of property. One ordinary meaning is: "the right to possess, use, and dispose of something; ownership." Webster's New World College Dictionary 1078 (3rd ed. 1996).

When enacting the FAAAA, Congress noted Joray's definition. The House Conference Report states:

> The conferees further clarify that the motor carrier preemption provision does not preempt State regulation of garbage and refuse collectors. The managers have been informed by the Department of Transportation that under ICC case law, garbage and refuse are not considered "property". Thus garbage collectors are not considered "motor carriers of property" and are thus unaffected by this provision.

H.R. Conf. Rep. No. 103-677, at 208 (1994), reprinted in 1994 U.S.C.C.A.N. 1715.

After the FAAAA was enacted, a member of the House of Representatives introduced into the record a letter from the general counsel of the ICC commenting on whether the act preempts state economic regulation of the curbside collection of recyclables. The counsel stated that garbage and refuse are not considered property under the relevant statutes, and noted the distinction between the curbside collection of recyclables and recyclables in commercial quantities, referring to Transportation of Waste Products for Reuse, 114 M.C.C. 92 (1971). 140 Cong. Rec. E2204-03 (October 7, 1994) (extension of remarks by Hon. Norman Mineta).

In Waste Products, the ICC held that waste materials purchased for use in recycling programs are property under the Act. The ICC noted that its jurisdiction would cover both the transportation from reclamation centers to recycling plants and then from the recycling plants to the manufacturing plants. In the ICC's view, the recycling plants provide

processing, such as grinding or crushing, to ready the commodity for the manufacturing process.

The explanation in Waste Products clearly applies to AGG's transportation of source-separated loads from the generator to the recycling plants, such as Smurfit. The transport of MSW loads also falls within the reasoning in Waste Products. The separation of the recyclables at the MRF is similar to the grinding of glass into cullet at a recycling center. Both processes are necessary to prepare the commodity for reentry into the manufacturing stream.

I conclude that the MSW loads have an economic value even though they are being discarded by the generators. ECR's business is based on the economic value inherent in the material. I see no reason to restrict the determination of economic value to the generators' view rather than to the manufacturing stream as a whole. There was also testimony that the paper mills could not run without the ability to purchase recycled paper. Further, some of the generators have contractual obligations to recycle some of their waste. Although it would be difficult to quantify the economic value flowing from compliance with this obligation, a value exists as part of the reason that the contracts are awarded.

I also disagree with defendants' position that the determination of what constitutes property is made solely on the basis of economic value. The ordinary meaning of property includes the concept of ownership and its related

obligations, specifically here, to properly dispose of the material rather than dumping it in a manner which might be inexpensive and easy but illegal.

My choice of a broader definition of property is supported by Nuclear Diagnostic Laboratories, Inc. 131 M.C.C. 578 (1979). The ICC reversed itself and ultimately concluded that radioactive waste material destined for burial was property under the act:

> Our dismissal of the application in the instant proceeding was based upon our conclusion that radioactive waste materials destined for burial do not constitute "property" because they lack economic value. Upon further reflection, we conclude that the economic value of hazardous materials, including radioactive waste destined for burial, should not be the sole criterion for determining whether these commodities are "property" subject to the general jurisdiction of the Commission. "Property" is not defined in the Interstate Commerce Act and, as we noted in our prior report, the word is subject to many different meanings. "Property" connotes ownership as well as value. Something that is owned can be "property" notwithstanding its lack of economic value.

Id. At 580.

In summary, I conclude that both the source-separated

loads[6] and the MSW loads, when collected from commercial and industrial accounts, are "property" as the word is used in the FAAAA. The local or state regulation of these loads is thus preempted by the FAAAA, including the two ordinances at issue.

III. Dormant Commerce Clause

AGG contends that the ordinances are unconstitutional barriers to interstate commerce. It contends that the ordinances are a direct burden on interstate commerce because they do not permit AGG to transport loads from the County and the City in interstate commerce. Alternatively, AGG contends that the indirect burden on interstate commerce is not balanced by the local benefits provided by the ordinances.

Two types of state regulations might burden interstate commerce: (1) those that directly burden interstate commerce or that discriminate against out-of-state interests; and (2) those that burden interstate transactions only incidentally. Regulations in the first category are unconstitutional unless the state can demonstrate that a legitimate local interest unrelated to economic protection is served by the regulation and no less discriminatory alternative exists. Regulations in

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[6] I realize that defendants are currently not trying to regulate the source-separated loads with a fair market value because of an exemption under state law. ORS 459A.075. Because all of the evidence was presented, however, I will decide the federal questions concerning these loads also.

the second category are analyzed under the *Pike* balancing test, Pike v. Bruce Church, 397 U.S. 137 (1970). Kleenwell Biohazard Waste v. Nelson, 48 F.3d 391, 395 (9th Cir.), cert. denied, 515 U.S. 1143 (1995).

If the primary purpose of the regulation is to regulate interstate commerce or if it favors in-state interests over out-of-state interests, it is generally in the first category. Regulations in the second category are those designed to address a legitimate local concern and only incidentally affect interstate commerce. The party challenging the validity of the regulation has the burden of demonstrating that it has a discriminatory purpose or effect. Id. at 398 and n.8.

In Kleenwell, the challenged regulation required all solid waste collection companies within the state to obtain a certificate of public convenience before collecting waste. The plaintiff solid waste collector specialized in medical waste. The court concluded the regulation at issue fell into the second category because it addressed a legitimate local concern, the safe disposal of solid waste, and it allowed both in-state and out-of-state firms to obtain the certificate. Id. at 398. After applying the *Pike* test, the court upheld the regulatory scheme.[7] Id. at 399.

In another solid waste case, C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383 (1994), the

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[7] The plaintiff only challenged the state's ability to impose a certification requirement and did not challenge the state's refusal to grant it a certificate.

Supreme Court determined that the challenged ordinance directly regulated interstate commerce and applied the test from the first group above. The ordinance was a flow control ordinance which required all solid waste in the town, whether generated there or brought there for processing, to be processed at a designated transfer station before leaving the town. The Court determined that the ordinance discriminates against interstate commerce because it drove up costs for out-of-state interests who disposed of their waste with haulers located in the town and it deprived out-of-state businesses access to a local market. "The essential vice in laws of this sort is that they bar the import of the processing service. . . .[T]he offending laws hoard a local resource [here, solid waste]. . . for the benefit of local business that treat it." Id. at 392. The law was struck down.

The collection and disposal of solid waste is considered primarily a function of state and local governments. Kleenwell, 48 F.3d at 398. The Supreme Court has rejected the contention that any regulation affecting particular companies engaged in interstate commerce necessarily represents a direct burden. Id. at 397, citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). The ordinances before me do not have a primary purpose of

regulating interstate commerce. Out-of-state interests are not discriminated against. It is true that the haulers in place when the ordinances were enacted were given an advantage in retaining their territories. Those haulers, however, could have been out-of-state firms. Although no one is getting a new territory and territories have not been reassigned except through sale of the original hauler, both in-state and out-of-state haulers can compete for the purchase of an existing franchise. Currently, Waste Management, a national corporation, owns several of the certificates. Accordingly, I conclude that the ordinances burden interstate commerce only indirectly and the *Pike* test should be used to analyze their constitutionality.

> The *Pike* balancing test recognizes that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Accordingly, under the *Pike* test, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, *it will be upheld unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits.*"

Kleenwell, 48 F.3d at 399 (internal quotation and citation omitted, emphasis in the original, quoting *Pike*, 397 U.S. at 142). The party challenging the regulation must establish that the burden on interstate commerce clearly outweighs the local benefits arising from the regulation. Id.

The local interest being protected by the ordinances is to provide safe, affordable and efficient waste disposal for all residential and commercial customers within Beaverton and unincorporated Washington County. This is a legitimate area of local concern and implicates public health and safety issues.

AGG relies on U&I Sanitation, 205 F.3d 1063, 2000 WL 199230 (8th Cir. 2000), which analyzed a flow control solid waste ordinance requiring all garbage collected within the city limits, except garbage destined for out-of-state disposal, to be processed at the city-owned transfer station that provided no recycling. Under the *Pike* test, the court concluded that the ordinance violated the Commerce Clause because of its effect in removing recyclables from the manufacturing stream. Although the effect of one city's ordinance might be minimal, the court considered the effect if all cities enacted similar ordinances, consequently substantially diminishing the market in recyclables. Id. at *4-5.

The ordinances before me are not flow control ordinances. The incidental burden that I find in them is that new companies, such as AGG, have a difficult, if not impossible, time entering the market in Beaverton or unincorporated Washington County. Although franchises have been purchased, this is not a common event. Moreover, the ordinances limit the hauler to its franchised geographic

area rather than allowing county-wide operations. The new companies, particularly AGG, might be more willing to take the MSW loads to a MRF rather than to a landfill. This would increase the available recyclables and have an incremental effect on interstate commerce. There is nothing in the ordinances, however, which prevents the franchisees from utilizing a MRF. It appears not to be happening because of a lack of MRFs in Washington County and no financial incentives to drive the MSW loads the extra distance for disposal at a MRF.

U&I Sanitation also considers less burdensome alternatives in the balance. Id. at *4. Portland and Multnomah County do not regulate commercial hauling by dividing the area into exclusive franchises. Haulers must be licensed but there was no evidence presented that licenses are limited if the basic requirements are met. AGG contends that this method should be used in defendants' geographic areas.

Certainly this is a possible alternative. One of defendants' concerns, however, was to provide affordable service to isolated rural customers. No evidence was presented comparing the population densities of Washington and Multnomah Counties. Portland is densely populated and would not present that issue.

After balancing the local public interest and the effects on interstate commerce, I conclude that the burden imposed upon interstate commerce is not clearly excessive in

relation to the putative local benefits. Accordingly, I find that the ordinances do not violate the Commerce Clause.

IV. Equal Protection Clause

Because I concluded above that the ordinances are preempted by the FAAAA, I decline to address AGG's final constitutional argument concerning violation of the Equal Protection Clause.

V. Injunctive Relief

Now that AGG has prevailed on the merits, I have the discretion to grant a permanent injunction enjoining defendants from enforcing the ordinances against AGG. Permanent injunctive relief is only appropriate if plaintiffs will suffer irreparable injury and monetary damages will not adequately compensate them for their injuries. Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998), cert. denied, 526 U.S. 1003 (1999).

While the injunction was in place during the Woodfeathers case, AGG expanded its business into the County and City. It ceased operations there when that injunction was dissolved. AGG's customers want to hire it for their work in those regulated areas. I believe that if AGG attempted to work there without protection of an injunction, haulers would continue to file complaints and AGG would continue to be cited under the ordinances.

Thus, we have a company which has been in business for many years, which has shown the ability to expand its

business into defendants' geographic areas, and which has current customers willing to hire it to work in those areas. Prohibiting AGG from working in defendants' geographic areas without paying fines and associated legal fees, when defendants are overstepping their authority, is an irreparable injury. Moreover, there is no reasonable way to calculate the monetary damages because the injury would continue indefinitely into the future. An injunction is an appropriate remedy.

CONCLUSION

Chapter 8.04 of the Washington County Code on Solid Waste Control and Chapter 4.08 of the City of Beaverton Code on Solid Waste Control, when enforced to prohibit AGG from transporting source-separated loads and mixed solid waste loads, are preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c), because they are related to service by a motor carrier with respect to the transportation of property.

A permanent injunction will be put in place. AGG should circulate a proposed injunction to defendants and intervenors within a week from the date of this opinion. If the parties can agree on language, a stipulated permanent injunction should be submitted within three weeks. If the parties cannot agree, each should submit a proposed injunction and/or their objections to the other proposed injunctions, within three weeks.

DATED this 6th day of April, 2000.

GARR M. KING
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

A.G.G. ENTERPRISES, INC., an Oregon Corporation,	)	
Plaintiff,	)	Civil No. 99-1097-KI
v.	)	
	)	PERMANENT
WASHINGTON COUNTY, OREGON and CITY OF BEAVERTON, OREGON,	)	INJUNCTION
Defendants.	)	

On April 6, 2000, this Court issued an Order and Opinion in the above-captioned matter. Consistent with this Court's opinion, the Court orders as follows:

1. On April 6, 2000, this Court filed an Opinion which declared that Chapter 8.04 of the Washington County code on Solid Waste Control and Chapter 4.08 of the City of Beaverton Ordinance on Solid Waste Control, when enforced to prohibit plaintiff A.G.G. Enterprises, Inc. from transporting source-separated loads of recyclable materials and mixed loads of solid waste and recyclable materials, are preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c), because they are regulating service performed by

a motor carrier with respect to the transportation of property.

2. Consistent with that opinion, Washington County, Oregon is permanently enjoined from enforcing its Solid Waste Control Code to the extent of imposing substantive standards affecting the price, route or service of plaintiff A.G.G. Enterprises, Inc. in the transport of source-separated loads of recyclable materials and mixed loads containing solid waste and recyclable materials for single generator non-residential accounts from, in and through Washington County to manufacturers, recycling facilities or material recovery facilities, but not to a transfer station or landfill.

3. The City of Beaverton is permanently enjoined from enforcing its Solid Waste Control Code to the extent of imposing substantive standards affecting the price, route or service of plaintiff A.G.G. Enterprises, Inc. in the transport of source-separated loads of recyclable materials and mixed loads containing solid waste and recyclable materials for single generator non-residential accounts from, in or through the City of Beaverton to manufacturers, recycling facilities or material recovery facilities, but not to a transfer station or landfill.

4. For purposes of this injunction, multi-family accounts such as apartment complexes or condominiums are considered to be residential accounts.

5. Pursuant to LR 54.1 and 54.4, plaintiff shall file and serve on all parties its Bill of Costs, no later than 14 days after the entry of this Judgment.

IT IS SO ORDERED.

DATED this 9th day of May, 2000.

GARR M. KING
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

A.G.G. ENTERPRISES, INC., an Oregon Corporation,	)	
Plaintiff,	)	Civil No. 99-1097-KI
v.	)	
	)	JUDGMENT
WASHINGTON COUNTY, CITY OF BEAVERTON, OREGON REFUSE & RECYCLING ASSOCIATION,	)	
Defendants.	)	

KING, Judge:

This action came on for trial before the Court, Honorable Garr M. King, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that Chapter 8.04 of the Washington County Code on Solid Waste Control and Chapter 4.08 of the City of Beaverton Ordinance on Solid Waste Control, when enforced to prohibit plaintiff A.G.G. Enterprises, Inc., from transporting source-separated loads of recyclable materials and mixed loads of solid waste and recyclable materials, are preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S. C. § 14501(c), because they are regulating service performed by a

motor carrier with respect to the transportation of property, and that plaintiff A.G.G. Enterprises, Inc., recover its costs of action.

IT IS SO ORDERED.

DATED this 10th day of May, 2000.

GARR M. KING
United States District Court Judge

49 U.S.C. § 10733. **Rates for transportation of recyclable materials (repealed)**

(a) A motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may provide transportation of recyclable materials without charge or at a reduced rate.

(b) In this section, "recyclable materials" means waste products for recycling or reuse in the furtherance of recognized pollution control programs.

(Added Pub. L 96-296 § 32(a), July 1, 1980, 94 Stat. 824.)

49 U.S.C. § 13507. **Mixed loads of regulated and unregulated property**

A motor carrier of property providing transportation exempt from jurisdiction under paragraph (6), (8), (11), (12), or (13) of section 13506(a) may transport property under such paragraph in the same vehicle and at the same time as property which the carrier is authorized to transport under a registration issued under section 13902(a). Such transportation shall not affect the unregulated status of such exempt property or the regulated status of the property which the carrier is authorized to transport under such registration.

49 U.S.C. § 13709. **Procedures for resolving claims involving unfiled, negotiated transportation rates**

(h) Claims involving small-business concerns, charitable organizations, and recyclable materials. –

(1) In general.—Notwithstanding subsections (b), (c), and (d), a person from whom the additional legally applicable and effective tariff rate or charges are sought shall not be liable for the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid—

(A) if such a person qualifies as a small-business concern under the Small Business Act (15 U.S.C. 631 et seq.).

(B) if such a person is an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, or

(C) if the cargo involved in the claim is recyclable materials.

(2) Recyclable materials defined.—In this subsection, the term "recyclable materials" means waste products for recycling or reuse in the furtherance of recognized pollution control programs.

49 U.S.C. § 14501. **Federal authority over intrastate transportation**

(c) Motor carriers of property. –

(2) Matters not covered. Paragraph 1—

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

AMICI CURIAE BRIEFS

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